86-945

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WKRG-TV, INC.,

Petitioner,

v.

DAN WILEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED FOR REVIEW

Whether the Constitution confers a privilege to publish a fair and accurate report of a false and defamatory statement made publicly about a public official when the report relates to a public controversy and does not concur in or espouse the defamation.*

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* WKRG-TV, Inc. is a corporation doing business in Alabama, wholly owned by a private individual.

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Petitioner, WKRG-TV, Inc., respectfully prays that a writ of certiorari issue to review the judgment and interlocutory order of the Supreme Court of Alabama entered in this defamation action on September 12, 1986.

OPINIONS BELOW

The order of the Circuit Court of Mobile County, Alabama, and the order of the Supreme Court of Alabama are unpublished and are included in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Alabama, affirming the trial court's denial of summary judg-

ment for petitioner, was entered on September 12, 1986. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment, United States Constitution:

   Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. Fourteenth Amendment, Section 1, United States Constitution:

   [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Statement of Facts

On Friday evening, March 25, 1983, a crowd of more than one hundred concerned citizens[1] assembled in the fellowship hall of the Orchard Baptist Church in the Orchard Community area of Mobile County, Alabama to participate in a public meeting organized by a local environmental activist group called the Society Against Dangerous Dumping. (R. 688) The citizens gathered to discuss a controversial proposal to place a "sanitary landfill" in their neighborhood for

[1] Deposition testimony indicates that there may have actually been 200 or more attendees at the meeting. (R. 690) The estimate of "more than one hundred" was a minimum estimate included in the news report at issue.

the disposal of toxic waste. In Mobile County, as elsewhere, landfill construction had already become an inflammatory issue, and the citizens who met on March 25, 1983 fiercely opposed the location proposed for the new sanitary landfill because they feared devaluation of their property and contamination of their drinking water. (R. 16)[2]

Approximately two weeks prior to the public meeting, citizens living in the neighborhood had received an anonymous "rumor sheet" in their mailboxes alleging that present and past members of the Mobile County Commission had a pecuniary interest in the corporation proposing the new sanitary landfill. (R. 14, 18) Specifically, the "rumor sheet" stated that Respondent Dan Wiley ("Commissioner Wiley"), then president of the Mobile County Commission, and former County Commissioner Bay Haas were part-owners of the A.J.B. Corporation, the corporation that had applied for a permit to operate a new landfill in the Orchard Community area. (R. 18)

As the rumor sheet circulated, igniting criticism of the landfill, the Society Against Dangerous Dumping held a meeting at the home of a concerned citizen to galvanize opposition to the proposal. Petitioner WKRG-TV, Inc. ("the Station"), owner of a local tel-

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[2] In fact, a later landfill controversy eventually mushroomed into a full scale scandal. Two local public officials were indicted and one later convicted for accepting bribes in return for landfill permits. Gurney Owens, chairman of the Mobile County Solid Waste Advisory Board was indicted on February 14, 1986 and convicted on May 28, 1986 of accepting bribes in exchange for landfill permits. Douglas Wicks, Commissioner Wiley's successor, also was indicted on October 10, 1986 for accepting bribes, and the case is still pending.

evision station, assigned one of its reporters, Barbara Shaw, ("Shaw") to cover the meeting. (R. 12-13) Shaw learned of the rumor sheet, met Mrs. Cecil Crow and Linda Young who seemed to be in charge of the meeting, and ascertained that the group was organizing a drive to circulate petitions protesting the landfill and planning a public meeting to discuss the issue. (R. 16)

After the meeting, Shaw prepared a story on the growing opposition to the controversial landfill. In an effort to investigate the accusations made in the rumor sheet, she spoke with James R. Payne, an owner of the A.J.B. Corporation. Payne told her that Commissioner Wiley owned no interest in the A.J.B. Corporation. (R. 578) Payne's attorney then called Shaw and told her that broadcasting the rumor might provoke a lawsuit. (R. 583) Shaw discussed the rumor sheet with the Station's news director (R. 583) who decided that since the rumor sheet was anonymously written and an identifiable source had denied the rumor, the Station would not report the rumor in Shaw's March 14, 1983 broadcast about the citizens' opposition to the proposed landfill. (R. 578, 580-81, 583)

The following week, the Society Against Dangerous Dumping informed the Station that a public meeting concerning the proposed landfill would be held on March 25, and the Station assigned Mark King, an award-winning,[3] five-year veteran in broadcast jour-

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[3] In 1984, King won four awards for broadcast journalism: the Georgia Bar Association's Silver Gavel Award for a documentary he had produced about "death row" prisoners; the Mobile Press Club's 1983 Award for Outstanding Journalistic Achievement; the Alabama Associated Press Broadcasters Association's award

nalism, to cover the public meeting. (R. 653, 688) Reporters from the *Mobile Press Register* and another Mobile television station, WALA-TV, also covered the meeting.

When King arrived at the meeting, he observed that every seat in the hall was occupied and that people were standing in the aisles and spilling out into the corridor behind the hall. (R. 690-91) Several local residents, including Linda Young and Mrs. Cecil Crow, were seated at a table in front of the group leading the meeting. (R. 690) The issues discussed at the meeting were summarized by King on the Station's ten o'clock news report that evening. The report began:

> (Studio introduction—live)[4]
> "Mark King was at a citizen meeting! Let's learn about it from him! Mark!
>
> (Mark King—videotape)
> "These people are upset because the A.J.B. Corporation has asked for permits to operate

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for the best documentary in Alabama; and the United Press International Broadcasters Association's award for the best documentary in Alabama and the southeastern United States. King also received an award from the University of Georgia for public service to broadcasting.

[4] The full studio introduction "pyramided" the news story by headlining the most controversial aspect of the public meeting—namely a charge of corruption among county officials. In total, the introduction read: "Good evening . . . do you want a landfill in your neighborhood? Well . . . neither do some homemakers in West Mobile! And they make a serious charge! According to this group . . . the county commission 'fixed' plans for the landfills because commission president Dan Wiley would profit! Mark King was at a citizens meeting! Let's learn about it from him! Mark!" (R. 184)

> private sanitary landfills on two locations in Howells Mill Road-Schillingers Road area. They say the two sites would not be suitable for landfills . . . because they're a part of the water shed for Hamilton Creek which leads into the City of Mobile's water supply.
>
> "Nonetheless, they believe the county has plans to grant permits for the private landfills and then contract with the A.J.B. Corporation to use the landfills for the counties [sic] trash.

The news report went on to summarize the extemporaneous statements of many speakers, including charges made by Mr. Cecil Crow ("Crow"), a former Republican member of the Mobile County Commission who had campaigned against Commissioner Wiley, a Democrat, in a hotly contested election three years earlier. During the meeting, Crow, who was seated in the audience, stood up, gained the floor, and repeated publicly the rumor sheet's accusation that Dan Wiley and Bay Haas were part-owners of the A.J.B. Corporation. Crow said that according to county engineers, the County Commission had "fixed" plans for two landfills because Commissioner Wiley would profit. (R. 685) Crow encouraged the crowd to attend the County Commission meeting on the following Monday to find out whether the rumor was true and to voice its opposition to the landfill. (R. 662) The crowd cheered and applauded Crow. (R. 671)

Later in the meeting, Crow addressed the group a second time and made the following remarks that were used in the broadcast:[5]

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[5] Because the meeting was often chaotic, with many people

> "The rumor says that Dan Wiley and Bay Haas are part owners of this corporation . . . And I think when we go down there Monday, that we're entitled to know, if there's anybody down there that's working both sides of the street.
>
> ". . . I mean, is he part owner of a corporation that's trying to do business with the county . . . if he is, we need to know it . . . if he isn't, we need to know it.

In addition to describing the sentiments of the citizens attending the public meeting, the Station's broadcast reported Commissioners Wiley and Haas' denials of the accusations:

> ". . . I contacted both commissioner Wiley and Mr. Haas at their homes tonight . . . Wiley says the rumors are ridiculous and he says he doesn't know what the A.J.B. Corporation is. Haas says the charges are totally untrue.

(R. 659, 710) The following Monday, March 28, 1983, the Station covered a County Commission meeting

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talking and shouting at once, the Station's cameraman could not tape the remarks of each speaker. (R. 663) When Crow initially stood up and spoke, the cameraman did not get Crow's remarks on tape, although Mark King made notes of those remarks. Therefore, King approached Crow after he had spoken and asked him to repeat his comments if Crow decided to speak before the crowd again, in addition to any further comments he might make later. Crow did speak before the crowd again, and at that time the cameraman taped Crow's slightly amended reiteration of his initial statements as well as his additional comments. (R. 691-92, 694)

over which Commissioner Wiley presided and again reported Commissioner Wiley's denial of Crow's accusations.

B. Procedural History

On May 24, 1983, Commissioner Wiley filed this defamation action against the Station in the Circuit Court for Mobile County, Alabama, alleging that the Station's March 25, 1983 news broadcast of statements made by Cecil Crow was libelous.[6] The Station asserted in its Answer, *inter alia*, that the broadcast fairly, accurately, and disinterestedly reported the allegedly false and defamatory statements made at the meeting.

The trial court denied the Station's Motion for Summary Judgment on May 9, 1985, and ruled "that this interlocutory order [denying summary judgment] involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this order would materially advance the ultimate termination of the litigation, and that the appeal would avoid protracted and expensive litigation." Appendix to Petition for Certiorari at la (hereinafter cited as "App.").

The Station petitioned the Supreme Court of Alabama for permission to appeal the controlling question of whether the First Amendment to the United States Constitution confers a privilege to accurately and neutrally report defamatory statements made publicly about a public official that relate to a public controversy. If such a privilege is constitutionally required,

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[6] Opting for the messenger rather than the speaker, Commissioner Wiley did not sue Cecil Crow.

then the Station has a complete defense to the instant defamation action. The Alabama court granted permission for the appeal on June 21, 1985, and issued a *per curiam* Opinion on September 18, 1986 affirming the trial court's interlocutory Order denying the Motion for Summary Judgment. App. at 3a. The Alabama court declined to adopt the version of the neutral reportage privilege articulated in the *Restatement* (Second) *of Torts*, § 611 (1977). In fact, the Supreme Court of Alabama refused to recognize the privilege on either constitutional or common law grounds even though the court cited one of its own opinions, handed down only nine months earlier, approving the very same privilege. App. at 5a.

Rather than directly addressing the central question presented by the interlocutory appeal, the Alabama court denied in a sentence the existence of a constitutional privilege and embarked on a lengthy explanation of why the common law privilege for fair and accurate reports of records of criminal proceedings was not applicable.[7] The court did not differentiate between the two somewhat related privileges although the privileges differ substantially both in terms of

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[7] In its Opinion, the Supreme Court of Alabama seems either determined to sidestep the issue certified for appeal or simply misdirected altogether. The extensive discussion of the Station's conduct in preparing the news report in question is illustrative of the court's misdirection. The Alabama court analyzes facts tending to show that the Station may have had the "actual malice" required to defeat a qualified privilege like the fair report privilege. The trial court, however, specified in its interlocutory Order that the controlling question of law was whether the press enjoyed an unqualified privilege for neutral reportage, obviating the need to analyze the facts for evidence of actual malice.

their application and their justification. As the Alabama Court noted, the fair report privilege is a common law privilege for the republication of official documents available for public inspection. The fair report privilege arises out of the originator's duty to publish the records in question, *e.g.*, records of judicial proceedings.

In contrast, the constitutional privilege of neutral reportage asserted by the Station arises not out of the originator's duty to publish but rather out of the press' responsibility as surrogate for the public to report what has already been published. This constitutional privilege protects the republication of defamatory statements because the public has a First Amendment interest in learning that certain defamatory statements were made, regardless of whether those statements are true. Therefore, the neutral reportage privilege gives the press an absolute defense to a defamation action even where it has knowledge that defamatory statements it republishes are false, so long as it reports the statements fairly, accurately, and neutrally.[8]

C. How The Federal Question Was Presented

The Station asserted a federal constitutional privilege to publish a neutral, fair, and accurate report of a defamatory accusation made publicly about a public official and relating to a public controversy both

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[8] A public official whose reputation is damaged as a result of false and defamatory statements still has a cause of action against the originator of the statements from whom the official may recover damages if he proves that false statements of fact were made with "actual malice." *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, ___ U.S. ___, 106 S.Ct. 1558 (1986).

in its Answer to Commissioner Wiley's Complaint and in its Motion for Summary Judgment. In urging reversal of the trial court's denial of the Motion for Summary Judgment, the Station advanced this federal constitutional privilege in its appeal to the Supreme Court of Alabama.

The interlocutory ruling by the Supreme Court of Alabama, refusing to recognize the constitutional privilege of neutral reportage, is a final judgment under Supreme Court Rule 17.1(c). The federal issue has been finally decided, and reversal of the state court on this federal issue would preclude any further litigation of the instant action.

If this Court does not grant this petition, the proceedings pending in the trial court will be decided on nonfederal grounds. If the Station prevails, it will incur unnecessary expenses of resources and time. If Commissioner Wiley prevails, the Station will be deprived of its constitutional rights and arguably left no opportunity for review of the Alabama court's ruling on the constitutional question now presented, since the issue will have been litigated already on an earlier interlocutory appeal.

As this Court stated in a similar case, "[d]elaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.' "[9] Reaching the merits would be consistent

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[9] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-6 (1975) (citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974)).

with the pragmatic approach this Court has followed in the past in determining finality.[10]

REASONS FOR GRANTING THE WRIT

A. To Protect Free Discussion of Public Affairs, A Core First Amendment Value, The Constitution Confers A Privilege To Accurately And Fairly Report About False And Defamatory Statements Concerning A Public Official Made At A Public Meeting In The Context Of A Public Controversy.

It is well-established by this Court that a "major purpose" of the First Amendment is "to protect the free discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). This Court also has recognized the critical role of the news media to the preservation of free discussion of public affairs:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . . Without the information

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[10] *See Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975); *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); and *Mills v. Alabama*, 384 U.S. 214, 221-222 (1966).

> provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975). The press often has been characterized as an agent for the public; when reporting about public events, the press acts as a "surrogate" for the pubic and informs citizens of what they would have seen and heard had they attended. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (Burger, C.J., announcing judgment); *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981). Thus, the press provides citizens with the necessary information about public issues to enable them to participate in a democracy.

Press reports about current public controversies would be bland, dry, and virtually meaningless indeed if they did not include statements made by and about public officials. In a political world dominated by personalities, issues and controversies of public concern typically unfold through statements and comments made by and about the public officials or public figures involved. Hence "a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than what somebody *did*." *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971) (emphasis by the Court). Often reports of false and defamatory statements provide the public with important information simply because they tell the public more about the speaker than the target of the statements.

Since the constitutionalization of libel law in 1964, a growing accretion of case law has demonstrated the

value to the public of uninhibited reporting on defamatory statements made about public figures. Illustrative is *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984), where a university basketball coach was accused of improperly accepting payments in violation of the rules of the National Collegiate Athletic Association. The accusations themselves, though false, gave rise to a controversy about illegal recruiting methods, eventually leading to the implementation of disciplinary measures in the school's basketball program. *Sports Illustrated* could not have reported about the public controversy without republishing defamatory statements at the very heart of the controversy. Thus, the *Barry* court recognized that "the public's 'right to know' that serious charges have been made against a public figure is an important application of the Supreme Court's concern that 'debate on public issues be uninhibited, robust and wide-open.' " *Id.* at 1125 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The court declined to hold *Sports Illustrated* liable for republishing the defamation, ruling that the Constitution confers an absolute privilege to neutrally republish defamatory statements leveled by one participant in a public controversy against another participant in that controversy. *Id.* at 1113.

The constitutional privilege of "neutral reportage" applied by the *Barry* court was, of course, first recognized by the United States Court of Appeals for the Second Circuit in *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977), and since has been recognized and adopted by numerous other courts.[11] In *Edwards*, the

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[11] In the instant case (unlike *Wilson v. Birmingham Post Co.*,

Second Circuit recognized that the press had a constitutional privilege to republish libelous statements made against several prominent scientists involved in a public controversy over the insecticide DDT. This privilege applies even if the press has serious doubts about the truth of the statements, so long as "the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made" and does not espouse or concur in the charges made. *Id.* at 120. The Constitution confers this privilege, according to the *Edwards* court, because "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that

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482 So. 2d 1209 (Ala. 1986)), the Supreme Court of Alabama, declined to adopt the privilege because the court deemed it to be tantamount to a "newsworthiness" test for determining whether a defamatory publication is protected by the First Amendment. App. at 6a. This Court rejected a newsworthiness test in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), because such a test would "[f]orce state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not." The Court held instead that the "actual malice" test of *Sullivan*, 376 U.S. at 279-80, applies to defamatory falsehoods leveled against individuals who have attained public figures status by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 344.

The Alabama court incorrectly construed the neutral reportage privilege. The privilege merely requires courts to determine whether the person allegedly defamed is a public figure or official, whether the alleged defamation was made publicly and in relation to a public controversy, and whether the alleged defamation was reported neutrally and accurately. Under *Sullivan* and *Gertz*, the courts already are required to make these determinations. No "*ad hoc*" determinations of newsworthiness need be made by the courts in applying the neutral reportage privilege.

the press be afforded the freedom to report such charges without assuming responsibility for them." *Id.*

The Station's news broadcast, like the *Barry* and *Edwards* news reports, revealed a raging controversy concerning the issuance of landfill permits in a Mobile County community. This controversy was quintessentially a matter of local government affairs and thus one of particular First Amendment concern. *See Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970). The accusations leveled by Cecil Crow against Commissioner Wiley before a large audience of local citizens, as well as the cheers and applause of the audience in response to those accusations, were empirical manifestations of the controversy. The Station could not have provided meaningful information concerning the controversy to the local citizenry without reporting about the accusations, nor could it have explained the accusations without repeating them. By reporting about the public meeting accurately and fairly without espousing the views expressed by the participants, the Station informed members of the public of what they would have seen and heard had they attended the meeting.[12]

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[12] In fact, the circumstances of the Station's news broadcast are virtually identical to the facts of *Greenbelt*, *supra*, in which a weekly newspaper republished a defamatory falsehood uttered by a citizen at a public hearing concerning a local controversy. In *Greenbelt*, this Court stated:

> It is not disputed that the articles published in the petitioners' newspaper were accurate and truthful reports of what had been said at the public hearings before the city council. In this sense, therefore, it cannot even be claimed that the petitioners were guilty

Even if the Station or its reporters had entertained serious doubts about the truth of Crow's allegations, the controversy still would have existed, and the public's First Amendment interest in learning about it, and consequently the Station's duty to report about it, would have been equally compelling. The public interest in learning of the accusations is that the statements were made, regardless of whether they were true or false. *Edwards v. National Audubon Society*, 556 F.2d at 120. By reporting the statements accurately and neutrally the Station ensured that "the public, not the press, [was] the ultimate arbiter of the truth of accusations made during the course of a public controversy." *Barry v. Time, Inc.*, 584 F. Supp. at 1127.[13]

The ruling of the Supreme Court of Alabama substantially undercuts the public's ability to ascertain the truth in a "free marketplace of ideas" by forcing the press to be the "ultimate arbiter" of truth and

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> of any "departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," *Curtis Publishing Co. v. Butts*, [388 U.S. 130, 155 (1967)] (opinion of Harlan, J.), much less the knowing use of falsehood or a reckless disregard of whether the statements made were true or false. *New York Times Co. v. Sullivan*, [376 U.S. 254, 280 (1964).]

Id. at 12-13.

[13] While the Station included the responses of Commissioners Wiley and Haas to Crow's accusations in its story, it was not required to do so under the neutral reportage privilege. As explained by the *Edwards* court, a "neutral" report does not "espouse," "concur in," or "deliberately distort" the charges. 556 F.2d at 120. Consequently, even if the Station had not reported the denials of Commissioners Wiley and Haas, its broadcast would have been privileged nonetheless as a "neutral" report.

falsity rather than a disinterested reporter of facts to the public. The Alabama court's rejection of a neutral reportage privilege no doubt will inevitably compel the press to suppress information about public controversies. As the court noted in *Barry v. Time, Inc.*:

> If a republisher may be held liable for passing on newsworthy but defamatory information to the public, it is likely that he will decline to publish this information for fear that his doubts will later be characterized as "serious" and therefore actionable. Even if he does not fear ultimate liability, the mere threat of costly and time-consuming inquiry into his state of mind may cast a chilling effect on publication. [citation omitted.] In this way, the public will be deprived of the opportunity to make informed judgments with respect to public controversies.

584 F. Supp. at 1125.

Defamatory accusations made at a public meeting against a local official during the course of a public controversy precipitate public discussion the protection of which is at the heart of the First Amendment. The First Amendment, therefore, confers a privilege to accurately and neutrally report about such statements. Absent such a privilege the press will be compelled to reduce sharply its coverage of controversial issues of public concern, severely burdening the ability of citizens to participate meaningfully in government affairs.

B. In Refusing To Recognize A Constitutional Privilege For Neutral Reportage, The Decision Of The Alabama Supreme Court Conflicts With Decisions By Other State And Federal Courts.

In the decade since this Court declined to review the Second Circuit's decision in *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir.), *cert. denied sub. nom Edwards v. New York Times Co.*, 434 U.S. 1002 (1977), considerable uncertainty and conflict has developed throughout the states, and between state and federal courts, on the issue of whether the First Amendment confers a privilege for "neutral reportage." Because this uncertainty is escalating, it is imperative that this Court now resolve the issue.

The constitutional privilege for neutral reportage has received conflicting treatment by the state courts and the federal courts in New York[14] and Illinois,[15] so application of the privilege in these states depends upon the forum in which a defamation claim is brought.

Furthermore, there is some conflict among federal circuit courts that have ruled on whether the Constitution confers a privilege for neutral reportage. The Seventh Circuit adopted the neutral reportage privilege in *Fadell v. Minneapolis Star & Tribune Co.*, 557 F.2d 107, 110 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977), while the Third Circuit expressly rejected the privilege in *Dickey v. CBS, Inc.*, 583 F.2d 1221

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[14] Compare *Edwards, supra*, with *Hogan v. Herald Co.*, 446 N.Y.S.2d 836, *aff'd*, 57 N.Y.2d 630 (1982).

[15] Compare *Novel v. Garrison*, 338 F. Supp. 977 (N.D. Ill. 1971), with *Newell v. Field Enterprises*, 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980).

(3d Cir. 1978). More recently, however, the Third Circuit departed from its analysis in *Dickey* and cited the privilege with approval in *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981). In *Medico*, the Third Circuit declared that its earlier rejection of *Edwards* was merely dicta. *Id.* at 145.

By contrast, there is general unanimity among federal district courts that the Constitution confers a privilege for neutral reportage. Three cases have directly applied the privilege, *Woods v. Evansville Press Co.*, 11 Med.L.Rep.(BNA) 2201 (S.D. Ind. April 17, 1985), *aff'd on other grounds*, 791 F.2d 480 (7th Cir. 1986); *Whitaker v. Denver Post*, 4 Med.L.Rep.(BNA) 1351 (D. Wyo. July 20, 1978); and *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984); and at least one other federal district court has recognized the constitutional privilege for neutral reportage, *Lasky v. ABC, Inc.*, 631 F. Supp. 962, 970-71 (S.D.N.Y. 1986) (defining the limits of the privilege).

Many state courts also have cited the neutral reportage privilege with approval. Among them, astonishingly, is the Alabama Supreme Court which cited the privilege with approval in a case decided just this year. *Wilson v. Birmingham Post Co.*, 482 So. 2d 1209 (Ala. 1986).[16] *See also Huszar v. Gross*, 468 So. 2d 572 (Fla. Dist. Ct. App. 1985); *Martin v. Wilson Publishing Co.*, 497 A.2d 322 (R.I. 1985); *Bair v. Palm Beach Newspapers, Inc.*, 387 So. 2d 517 (Fla. Dist. Ct. App. 1980); *Burns v. Times Argus Ass'n.* 139 Vt. 381, 430 A.2d 773 (1981); *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 426 N.Y.S.2d 274 (1980); *Krauss v.*

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[16] *See also* App. at 5a.

Champaign News Gazette, Inc., 59 Ill. App. 3d 745, 375 N.E.2d 1362 (1978); *McCracken v. Gainesville Tribune, Inc.*, 146 Ga. App. 274, 246 S.E.2d 360 (1978); *J.V. Peters & Co. v. Knight Ridder Co.*, 10 Med. L. Rep.(BNA) 1576 (Ohio Ct. App. 1984); and *Wade v. Stocks*, 7 Med. L. Rep.(BNA) 2200 (Fla. Cir. Ct. 1981). Yet other state courts have rejected the privilege. *Janklow v. Viking Press*, 378 N.W.2d 875 (S.D. 1985); *Hogan v. Herald Co.*, 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002 (1982) (with strong dissenting opinions);[17] *Postill v. Booth Newspapers, Inc.*, 118 Mich App. 608, 325 N.W.2d 511 (1982); *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied sub nom Courier-Journal v. McCall*, 456 U.S. 975 (1982); *Newell v. Field Enterprises, Inc.*, 91 Ill. App. 3d 735, 415 N.E.2d 434 (1980); and *Makis v. Area Publications Corp.*, 77 Ill. App. 3d 452, 395 N.E.2d 1185 (1979).[18]

Numerous lower courts and commentators[19] have grappled with the issue of whether the First Amend-

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[17] This New York case is in direct conflict with *Edwards v. National Audubon Society, supra*, a Second Circuit case.

[18] These Illinois state cases are in conflict with another Illinois State case, *Krauss v. Champaign News Gazette, supra*, and with an Illinois federal district court case, *Novel v. Garrison, supra* note 15.

[19] *See, e.g.*, M. Franklin, "A New Constitutional Privilege?" *Cases and Materials on Mass Media Law*, 178-189 (2d ed. 1982) and 39 (2d ed. Supp. 1985); Note, "The Developing Privilege of Neutral Reportage," 69 Va. L. Rev. 853 (1983); and Sowle, "Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report," 54 N.Y.U. L. Rev. 469 (1970).

ment confers a privilege for neutral reportage, yet no consensus of opinion has emerged. Therefore, the ambit of the First Amendment varies among judicial fora. To ensure that the courts guard the public's First Amendment rights uniformly, it is incumbent upon this Court to declare that the First Amendment confers a privilege for neutral reportage.

CONCLUSION

In view of the Supreme Court of Alabama's failure to recognize the constitutional privilege to publish a fair and accurate report of a false and defamatory statement made publicly about a public official when the report relates to a public controversy and does not concur in or espouse the defamation, the Station respectfully requests that its petition be granted and the decision below be reversed in accordance with Supreme Court Rule 23.2.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DAN WILEY,

Plaintiff,

vs.

WKRG-T.V., INC.,

Defendant.

ORDER

This matter having come on for hearing on the defendant's motion for summary judgment, and the Court having considered said motion, the pleadings and depositions on file, and arguments of counsel, it is

ORDERED that the defendant's motion for summary judgement [sic] be and the same hereby is DENIED. The Court finds that this interlocutory order involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this order would materially advance the ultimate termination of the litigation, and that the appeal would avoid protracted and expensive litigation.

DONE at Mobile, Alabama, this 9th day of May, 1985.

/s/BRAXTON L. KITTRELL, JR.
Circuit Judge

APPENDIX B

THE STATE OF ALABAMA - - - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

JUNE 19, 1985

WKRG-TV, INC.,

Plaintiff,

v.

DAN WILEY,

Defendant.

ORDER

The petition for permission to appeal from an interlocutory order entered in the above cause having been filed and duly submitted to the Court, it is considered that the petition is due to be granted.

IT IS, THEREFORE, ORDERED, pursuant to the provisions of Rule 5, Alabama Rules of Appellate Procedure, that permission is hereby granted to the petitioner to appeal to this Court from the interlocutory order entered on May 9, 1985, in the case of WKRG-TV, Inc., v. Dan Wiley, Civil Action No. CV-83-001337.

Torbert, C.J., and Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

Faulkner, J., not sitting.

APPENDIX C

THE STATE OF ALABAMA - - - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1986

WKRG-TV, Inc.,

Appellant,

v.

Dan Wiley,

Appellee.

Appeal from Mobile Circuit Court

PER CURIAM.

This is a libel suit brought by Dan Wiley against WKRG-TV, Inc. Wiley's complaint charges that WKRG libeled him in a televised news report about a public meeting held at the Orchard Baptist Church concerning a proposed landfill site. At the time of the alleged libel Wiley was a member of the Mobile County Commission, and the report stated that persons at the meeting charged that Wiley would profit from the proposed landfill.

WKRG made a motion for summary judgment, contending that under the pleadings and depositions on file it was entitled to judgment because its broadcast of the allegedly libelous material was privileged, being an accurate and complete report, or a fair abridgement, of an occurrence at a public meeting pertaining to a matter of public concern. The trial court denied the motion but found, in accordance with A. R. App. P. 5(a), that

> "this interlocutory order involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this order would materially advance the ultimate termination of the litigation,

and that the appeal would avoid protracted and expensive litigation."

This Court granted permission to appeal. Rule 5, A. R. App. P.

WKRG argues that the privilege set forth in *Restatement of Torts* (Second), § 611 (1977), should be adopted as the law of this State and that, under this privilege, WKRG cannot be held liable for its broadcast in this instance. The Restatement section reads:

"Report of Official Proceeding of Public Meeting

"The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported."

It appears that any such privilege heretofore recognized in this State is much more limited, and would correspond at most to the "official action or proceeding" portion of the rule. Code 1975, § 13A-11-161, provides:

"The publication of a fair and impartial report of the return of any indictment, the issuance of any warrant, the arrest of any person for any cause or the filing of any affidavit, pleading or other document in any criminal or civil proceeding in any court, or of a fair and impartial report of the contents thereof, or of any charge of crime made to any judicial officer or body, or of any report of any grand jury, or of any investigation made by any legislative committee, or other public body or officer, shall be privileged, unless it be proved that the same was published with actual malice, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a rea-

> sonable explanation or contradiction thereof by the plaintiff, or that the publisher has refused upon the written request of the plaintiff to publish the subsequent determination of such suit, action or investigation."

See *Wilson v. Birmingham Post Co.*, 482 So. 2d 1209 (Ala. 1986); *Fulton v. Advertiser Co.*, 388 So. 2d 533 (Ala. 1980); *Browning v. Birmingham News*, 348 So. 2d 455 (Ala. 1977).

This Court in *Browning, supra*, reiterated the test for the existence of a qualified privilege as it had been set forth in *Willis v. Demopolis Nursing Home, Inc.*, 336 So. 2d 1117, 1120 (Ala. 1976), and *Berry v. City of New York Ins. Co.*, 210 Ala. 369, 98 So. 290 (1923):

> "Where a party makes a communication, and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged, *if made in good faith and without actual malice.* . . . The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social or moral in its nature and defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken."

348 So. 2d at 458 (emphasis in *Browning*).

We certainly do not think that a reporter has a duty to repeat a defamatory falsehood, but the Restatement rule would have the publication privileged even if the publisher knows that the statement was false, so long as the report is a fair and accurate rendition of what transpires at the public meeting. The premises of this rule are that (1) the publisher is making a "true" statement of the events of

the meeting, regardless of the truth or falsity of the statements made in the meeting, and (2) the publisher is entitled to a privilege in the publication of such public meetings on matters of public concern because they are newsworthy, that is, the general public has a legitimate interest in hearing about the meeting.

The first premise clearly cannot stand as a justification without the second, because the repetition of a defamatory statement generally constitutes a new publication and is actionable. As to the second premise, we deem it instructive that the United States Supreme Court has rejected a "newsworthiness" test for determining whether a defamatory publication is protected by the First Amendment. Such a test was implied in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971), but was disapproved in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Thus, we do not think that WKRG has a constitutional right to repeat false statements simply because they were made at a public meeting on a matter of public concern.

Of course, Wiley was a public official at the time of the meeting, and the statements at least implied that he was misusing his public office; apparently the county commission, of which Wiley was president, had a role in the approval of the landfill site. As a public official, Wiley would have to prove that WKRG broadcast the allegations with knowledge of their falsity or with reckless disregard of their truth or falsity. *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The materials submitted in support of and in opposition to the summary judgment motion raise a clear factual question on this issue, as we shall now show with a further recitation of the facts in the record.

A transcript prepared by WKRG of the news report shows that Curt Fonger introduced the report from

WKRG's studio and Mark King continued with a live report from the location of the meeting:

> "Good evening . . . Do you want a landfill in your neighborhood? Well . . . neither do some homeowners in west Mobile! And they make a serious charge! According to this group . . . the county commission 'fixed' plans for two landfills . . . because commission president Dan Wiley would profit! Mark King was at a citizen's meeting tonight! Let's learn about it from him! Mark!
>
> "Curt . . . about one-hundred citizens from west Mobile turned out for the meeting at the Orchard Baptist Church. They came to map strategy for their fight.
>
> "These people are upset because the A.J.B. Corporation has asked for permits to operate private sanitary landfills on two locations in Howells Mill Road-Schillingers Road area. They say the two sites would not be suitable for landfills . . . because they're a part of the water shed for Hamilton Creek which eventually leads into the City of Mobile's water supply.
>
> "...None the less, they believe the county has plans to grant permits for the private landfills and then contract with the A.J.B. Corporation, to use the landfills for the counties [sic] trash.
>
> "...They claim a recent announcement that the county landfill near Irvington would have to be closed soon is part of this plan. ...And they say public officials would profit from the deal.
>
> "[Some items in the record would indicate that the following two paragraphs are transcriptions of statements made by Cecil Crowe, a citizen at the meeting:]

"The rumor says that Dan Wiley and Bay Haas are part owners of this corporation ... And I think when we go down there Monday, that we're entitled to know, if there's anybody down there that's working both sides of the street.

"...I mean, is he part owner of a corporation that's trying to do business with the county, ... if he is, we need to know it ... if he isn't, we need to know it...

"...I contacted both commissioner Wiley and Mr. Haas at their homes tonight. ...Wiley says the rumors are ridiculous and he says he doesn't know what the A.J.B. Corporation is. Haas says the charges are totally untrue.

"...Anyway, the citizens plan to turn out in large numbers for the county commission meeting on Monday morning. They've also hired a geologist to double check soil tests the state has run on the two sites. Curt."

Wiley argues that the report was not an accurate report of what was said at the meeting, that it was a report of what one person, not what the "homeowners" or the "people," said, and that it presented only one side of the story. These arguments are made primarily to show abuse of the Restatement privilege. If Wiley can prove that WKRG thus falsified the report, he would not only show the actual malice required by *Sullivan* but also defeat the claimed privilege.

Cecil Crowe, one of the participants at the meeting, apparently made most of the allegedly libelous remarks that WKRG repeated in its report. There is some indication that the following portion of the above-quoted transcript is from a videotape of Cecil Crowe actually making the statements:

> "The rumor says that Dan Wiley and Bay Haas are part owners of this corporation ... and I think that when we go down there [to the county commission meeting] Monday, that we're entitled to know if there's anybody down there working both sides of the street.
>
> "...I mean, is he part owner of a corporation that's trying to do business with the county, ... if he is, we need to know it ... if he isn't, we need to know it."

Marginal notations on the transcript indicate that Crowe was on camera, but do not clearly indicate that he made these statements. King, in his deposition, said that he taped Crowe making these statements. It appears, however, that King did not tape Crowe when he first made the statements but asked him after he finished to repeat them for the camera if he spoke to the group again. One of the depositions indicates that Crowe later denied having accused Wiley, claiming that he only said he wanted to find out the truth. As presented in the record, this is hearsay, and the record is ambiguous as to whether Crowe denied making charges at the public meeting or at the later county commission meeting. Furthermore, although the record does not indicate that Crowe spoke for the group as a whole or that any designated spokesman made these statements, there is some indication that the group applauded Crowe's statements. Thus, there is some factual dispute as to the accuracy of the report on the alleged accusation.

Even more significant is the fact that WKRG had substantial information that the accusation was not true, but broadcast the report anyway and made no mention of this information. The original source of the accusation was a rumor sheet placed anonymously in the residents' mailboxes about two weeks before the meeting. Barbara Shaw, a reporter for WKRG, investigated the rumor at the time. She talked to James R. Payne, the owner of A.J.B. Cor-

poration, who denied that Wiley or Haas had any interest in A.J.B. Payne's attorney called Shaw and offered to show her documents proving Wiley owned no stock in A.J.B. Wiley was out of the country at the time of this initial investigation, but an attorney for the county called Shaw and told her not to publish the rumor because it was false. On March 14, WKRG broadcast Shaw's report that the citizens were concerned about the proposed landfill but did not mention the rumors about Wiley at that time.

King testified in his deposition that he was aware when he made the March 25 broadcast that Payne had denied that Wiley owned any part of A.J.B. Corporation. Wiley stated in his deposition that when King called him before making the March 25 report, he not only denied knowing anything about A.J.B. Corporation, but also told King that Shaw had previously investigated the matter. Given the record before us, we cannot say that Wiley would be unable to sustain a libel action, including proof of *Sullivan* actual malice by clear and convincing evidence. See *Pemberton v. Birmingham News Co.*, 482 So. 2d 257 (Ala. 1985). Therefore, the trial court did not err in denying the motion for summary judgment. The interlocutory ruling is affirmed.

AFFIRMED.

Torbert, C.J.; Jones, Almon, Shores, Adams, Houston and Steagall, JJ. concur. Maddox, J., concurs in the result.

No: 86-945

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

WKRG-TV, INC. *
Appellant, *

vs. * CASE NUMBER
86-945

DAN WILEY, *
Appellee. *

RESPONSE OF APPELLEE

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Mobile, Alabama 36608
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QUESTION PRESENTED FOR REVIEW

Does the Constitution of the United States of America confer an absolute privilledge on a local television station to broadcast defamatory material without regard to the truth of the material, intent or knowledge of the station.

This question is substantially different than that stated in the Petition for Writ of Certiorari. The major difference is the issue of whether or not the report was "fair and accurate". The Supreme Court of Alabama stated that this was an unresolved question of fact; page 8(a) of the Petition for Writ of Certiorari: "If Wiley can prove that WKRG thus falsified the report, he would not only show the actual malice required by Sullivan but also defeat the claimed privilege." The Supreme Court of Alabama found from the record: "Thus there is some factual dispute as to the accuracy of the report on the alleged accusation". Page 9(a) of the appendix.

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No: 86-945

IN THE
SUPREME COURT OF THE UNITED STATES

WKRG-TV, INC. *
Appellant, *

vs. * CASE NUMBER
86-954

DAN WILEY, *
Appellee. *

RESPONSE OF APPELLEE

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STATEMENT OF JURISDICTION

The Supreme Court should not exercise jurisdiction in this case as Petitioner has not propounded a question of Federal Law which has not been but should be, settled by this Court; nor has Petitioner presented to the Court a Federal Question.

STATEMENT OF THE CASE

A. PROCEEDUREAL HISTORY

Dan Wiley, Respondent respectfully submits to this Court that the proceedural history given by petitioner is incorrect.

Respondent, Dan Wiley sued WKRG-TV, INC., Petitioner herein, based on a broadcast by WKRG-TV, INC.. The source of the content of this broadcast is unknown, although the evidence indicates that the slander, or portions thereof, originated with the Petitioner, not Cecil Crow.

The Honorable Braxton L. Kittrell, Jr, trial judge, denied the motion for summary judgement filed by the Petitioner based on the law and facts of this case.

The Supreme Court of Alabama granted certiorari to review the interlocutory order of the trial judge and, after reviewing the facts affirmed that order denying summary judgement. The opinion of the Supreme Court of Alabama is before this court as Appendix C to Petitioner's brief and speaks for itself concerning the constitutional privilege better than the rendition given by Petitioner or Respondent.

Respondent is unable to determine what portions of the Supreme Court of Alabama opinion are referred to in the Petition for Writ of Certiorari pages 8 through 10.

The most narrow interpretation of the Alabama ruling may be summarized as: where statements are manufactured by a news service, and the said statements are false or misleading, and said statements are made in bad faith and with "actual malice", there is no constitutional First Amendment privilege. The findings necessary to support a slander case in these circumstances are a question for the trier of fact. "Given the record before us, we cannot say that Wiley would be unable to sustain a libel action, including proof of Sullivan actual malice by clear and convincing evidence." WKRG-TV, INC., v. DAN WILEY, Page 10(a) Appendix C to the Petition for Writ of Certiorari.

Where a party makes a communication which is otherwise privileged, that privilege does not extend to a statement which is not made in good faith and with "actual malice". WKRG-TV, INC., v. DAN WILEY, Page 10(a), Appendix C to the Petition for Writ of Certiorari, citing Browing v. Birmingham News, 348 So. 2d 455 at 458 (Ala. 1977).

Neither WKRG nor anyone else has a constitutional right to repeat false statements "simply because they were

made at a public meeting on a matter of public concern." WKRG-TV, INC., v. DAN WILEY, Page 6(a), Appendix C to the Petition for Writ of Certiorari.

B. STATEMENT OF FACTS:

Respondent, Wiley, would respectfully submit that the statement of the facts made by the attorney of record for the Petitioner, WKRG-TV, Inc. is largely misleading. In order to allow this Court to properly review the facts, the larger of the alleged misleading portions in the Petition for Writ of Certiorari are enumerated below and a full statement of the facts follows:

1. The most glarring misstatement is that WKRG-TV, INC. gave a fair and accurate report of what was said at a pulic meeting. This is contrary to the evidence which shows that the broadcast was false and a product of WKRG-TV, INC., not the public meeting.

2. Petitioner states that Cecil Crow and Linda Young seem to be in charge of the meeting on page 3-4 of the Petition for a writ of Certiorari. Apparently, this election of Cecil Crow and Linda Young was made by either WKRG or counsel of record for the Petitioner.

3. Portions of the statments made by the TV Station are added in a foot

note on page 5 as opposed to being portrayed in the content in which they were broadcast.

4. On page 6 of the Petition for Writ of Cartiorari the Petitioner states that the news reports summarized the extemporaneous statements of many speakers, including charges made by Cecil Crow. This statement concerns extemporaneous statements allegedly made by Cecil Crow. Crow has denied making these statements.

4. The Petitioner seems to have taken the fact that certain members of the crowd cheered and applauded portions of a speech made by Mr. Crow as equivalent to the entire crowd making an allegation that Dan Wiley was involved with landfill kickback scheme. (Page 6).

5. Petitioner seeks to inflame this Court by showing that there is a completely unrelated scandal concerning landfills which does not involve Dan Wiley in any way. The truth defence for slander exists in Alabama and WKRG is unable to avail itself of that defence. (page 3)

C: DETAILED STATEMENT OF THE FACTS

The Plaintiff/Appellee/Respondent is Dan Wiley. At the time of the alleged libel, Dan Wiley was the President of the Mobile County Commission.

WKRG is a local broadcasting station carrying CBS broadcasting in the Mobile, Alabama area. WKRG broadcasted the alleged libel and is the Defendant/Appellant/Petitioner herein. Mark King is a reporter who worked exclusively for WKRG during the alleged libel.

Cecil Crow is an avid political supporter of one of the two major political parties. Dan Wiley is a member of the other major political party. Despite Crow's own denial, the libel is attributed in large part to Cecil Crow. (T-366)

Barbara Scheucher uses the stage name Barbara Shaw. Barbara Shaw is a reporter for WKRG. On March 14, 1985, after investigation of a rumor sheet alleging similar facts to the alleged libel, Ms. Shaw declined to include the libel in her story. (T-576, 578, 580, 581).

Patrick Miller was a photographer at the location of the alleged libel and was working for WKRG.

The libel occurred on March 25, 1983. WKRG, TV, INC., Defendant/Appellant/Petitioner has investigated this matter since March 14, 1985 without finding any proof of the facts alleged in the libel. (T 576-577) The original source of the libel is apparently an anonymous "rumor sheet" and this origin was known to the Defendants. (T-576)

The facts of this case would support one of four conclusions, any one of which would be sufficient to hold the Defendants guilty of libel.

(1) The statements made at the meeting were not the statements which were broadcast. (2) The statements made at the meeting were not made by the parties to whom they were attributed. (3) The statements made at the meeting were known to be false or were believed false due to investigation and the investigation was not made known to the public in the broadcast nor the scope of the investigation. (4) The statements reported to have been made at the meeting were engineered or staged in part or in total by the Defendant. (T-694)

The entire alleged libel in this case is set forth in the deposition transcript, pages 552, 553 and 554 and this statement is set forth in full below.

"Good Evening...Do you want a landfill in your neighborhood? Well...neither do some homeowners in west Mobile! And they make a serious charge! According to this group...the County Commission 'fixed' plans for two landfills...because Commission President Dan Wiley would profit! Mark King was at a citizen's meeting tonight! Let's learn about it from him. Mark!

"Curt...about one hundred citizens from west Mobile turned out for the meeting at the Orchard Baptist Church. They came to map strategy for their fight. These people are upset because the A.J.B. Corporation has asked for permits to operate private sanitary landfills on two locations in Howells Mill Road-Schillinger Road area. They say the two sites would be suitable for landfills...because they're a part of the water shed for Hamilton Creek which eventually leads into the City of Mobile's water supply.

"...None-the-less, they believe the county has plans to grant permits for the private landfills and then contract with the A.J.B. Corporation, to use the landfills for the counties trash.

"...They claim a recent announcement that the county landfill near Irvington would have to be closed soon as a part of this plan.

"...And they say public officials would profit from the deal...

"The rumor says that Dan Wiley and Bay Haas are part owners of this corporation... and I think that when we go down there Monday, that we're entitled to know if there's anybody down there working both sides of the street.

"...I mean, is he part owner of a corporation that's trying to do business with the County,...If he is, we need to

know it...if he isn't, we need to know it...

"...I contacted both Commissioner Wiley and Mr. Haas at their homes tonight.

"...Wiley says the rumors are ridiculous and he says he doesn't know what the A.J.B. Corporation is. Haas says the charges are totally untrue.

"...Anyway, the citizens plan to turn out in large numbers for the County Commission Meeting on Monday morning, they've also hired a geologist to double check soil tests the state has run on two sites. Curt." (T-552-554)

In the instant case, evidence exists that the slander which purportedly took place at a public meeting was engineered in part by the television reporter who worked for WKRG. Excerpts from their transcript pages T-710-715, shown below, exemplify this.

Deposition of Mark King

A. "...I reported what was said at a public meeting and Mr. Crow mentioned Mr. Wiley and Mr. Haas most prominently. I called Mr. Wiley and Mr. Haas at home and got their reaction and I gave their reaction.

Q. " Well, you didn't just report on the public meeting. You reported on

what Mr. Wiley and Mr. Haas told you. They weren't at the meeting, were they?

A. "No, but I reported on their reaction on what was said about them at a public meeting.

Q. "You knew before this story that Mr. Payne had told your station that Dan Wiley didn't own any interest in his corporation; you knew that, didn't you?

A. "I knew that, yes."

Q. "Well, Mr. Fonger also reported that according to the group the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit; didn't Mr. Fonger report that?

A. "If it says here in the script that -- in the transcript that he did, I suppose he did, yes.

Q. "Now, who said that at the meeting?

A. "Mr. Crow used the word 'fix,' the fix is in.

Q. "I ask you who said 'the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit?'

A. "I don't know if anyone said that verbatim or not. We take stories -- when we do a story, we take what was said and put it in a -- we don't --

everything that's in one of our stories isn't word for word, something that someone said at a meeting. It would be impossible.

Q. "Who at the meeting said 'public officials would profit from this deal'?

A. "Mr. Crow said things to that effect, if not that particular statement. I can't remember whether or not he made that particular statement or not.

..."He certainly made statements that were -- you know, that he, -- I believe I do remember, and of course it has been a long time ago, but I believe I remember him saying that somebody on the County Commission would profit.

Q. "No, but when he makes critical statements such as you have described, or potentially sensitive statements, you want to write those down, wouldn't you?

A. "As much of them as I could. And, I can -- you know, a lot of times when I cover something like that, I can only write down a few words or a few portions of that statement.

A. "The request of the retraction, I believe the first time I would have heard about that would have been on Wednesday of the following week."

Although the libelous statements allegedly were made by a particular person, Cecil Crow, the Defendant did not know anything concerning Cecil Crow nor his reputation for truth and veracity. (T-673-674)

Nothing issued from the crowds which would show that the entire crowd made any charge whatsoever.

Deposition of Patrick Miller, T-127, 128:

A. "Well, you can talk about an issue without ever really being clear on your stand, and there were a number of people there who were highly emotional and yet really weren't clear on what they had to say, or at least that was my judgment and it was Mark's judgment as well. We were waiting until we had someone who was fairly knowledgeable on the subject who could state themselves in a rather concise manner."

The "group" to whom the allegations are attributed is a single speaker, now known to be Cecil Crow. Mr Crow is not a leader of the group that had met. Mr. Crow himself has denied making the statements (T-366). In Patrick Miller's deposition, (T-128) Mr. Miller states as follows:

Q. "Who was the leader of the group

if there was one? Did they have a president or...?

A. "There were several people seated at a table in front of the group. I don't remember their names offhand.

Q. "Was the man that you ultimately interviewed one of those people?

A. "He seemed to have some contact with the people along the front table but he was not seated at the table. He was off to the side.

T-671 Deposition of Mark King

Q. "All right, sir. Now, who was it that said public officials were going to profit from the deal? Who is 'they?'

A. "Cecil Crow stated it, the large crowd that was there applauded, cheered and made it clear that they supported what he was saying.

Q. "If Cecil Crow had stood up and said that Dan Wiley has murdered his grandmother, and everybody applauded, would you have reported that?

A. "I don't know."

See also (T-712,713) set forth above.

(T-697,698)

Q. "Well, why is it you didn't film the statements made by Mrs. Crow or Mrs.

Young and put them on the air?

A. "They were more or less background statements.

Q. "They weren't spicy enough for you?

A. "I don't think that's a good word. I don't think "spicy" is what I'm looking for. They were background statements. They were explaining why they were gathered there.

Q. "Well, isn't that the reason you were there to show why they were gathered there?

A. "Why they were gathered there and what was going on."

Several facts show that WKRG had a part in orchestrating the libel reported.

T-129, 131 Deposition of Patrick Miller

A. "We were -- had our equipment down when he stood up and spoke and he made the statement that there was a fix on downtown, that the efforts of the group to stop the landfill development were in vain, and Mark indicated that this was the type of information that he wanted, what he felt like reflected the view of the group as a whole.

Q. "Now, after the meeting ended,

Mark interviewed a couple of people before he got to Mr. Crow, is that what I understand?

A. "No. Actually what happened was Mr. Crow stood up again -- Mark had spoken with Mr. Crow during the course of the meeting. Mr. Crow stood up again after Mark finished talking with him and I prepared for what I first thought was going to be a one-on-one interview. Actually Mr. Crow stood before the group and basically restated what he had said earlier and that was that...."

The following statements also support the allegation that the matter was staged by the television station. (T-693-694)

Deposition of Mark King

Q. "Did you ever, at any time, go to Mr. Crow and ask him to stand up and make a statement?

A. "No, I did not ask him to stand up and make a statement.

....I went to Mr. Crow after the first time he stood up and I introduced myself, told him who I was with, I asked him for a brief interview after the meeting was over and he said fine. I also said, if you're going to be up there again, would you mind repeating what you said the first time? He said that he would not mind.

"....I didn't ask him to stand up. I said if you going to be up there anyway, if you plan on getting up again.

Q. "Why in the world would he plan on getting up again and saying the same thing he had already said?

A. "Because it was a spontaneous meeting. It was a thing where he didn't -- when he got up there the first time, it wasn't something that was planned. He just kind of walked up from outside of the crowd and started saying things."

It was the policy of the Defendant that first "WKRG must broadcast only verifiable, accurate, privately based news." (T-217). Second, "the reporter should handle with the utmost care and caution any story which tends to injure a person's reputation." (T-228). Third, "[T]he best safeguard against a libel suit is to make certain, before broadcast, that any potential libelous statement is true and even more importantly, can be proved to be true." (T-229). Fourth, "one of the most common misconceptions about libel law is that a station can avoid liability for a false statement so long as it merely repeats or attributes the statement to a particular person. This simply is not the general state of the law." (T-230).

It should be noted for purposes of this appeal, that not only is it alleged that the statements were not made, but

that even in the event that they were made, the statements were not attributed properly. The fact that the origin of the statements was an "anonymous rumor sheet" was never broadcast.

Fifth, it is also WKRG's policy to "[A]void slipshod and indifferent or careless reporting. Whenever a statement could injure someone's reputation, treat it like fire." (T-236). Sixth, it is also the policy that "[T]he fact that a person is quoted accurately is not in itself a defense for a subsequent libel action if the quoted statement contains false information about someone." (T-237).

The Defendant's employee, Kurt Fonger, has stated that he had an obligation to do more than simply read what was handed to him. (T-239). In this case, it is fairly obvious that that responsibility was not fulfilled. In the deposition of Dan Wiley, Mr. Wiley states that he requested that the station contact Barbara Shaw prior to airing this particular news story due to her superior knowledge of the news story and there is evidence in the record which suggests that the Defendant refused to take even this step of consulting with its own investigative reporter before airing the story. (T-501).

ARGUMENT

SUMMARY OF THE ARGUMENT

Two conflicting needs must to be considered in this type of litigation. First is the need for the press to operate with as little interference as possible and to be able to report events to the public as they transpire in order to keep the public fully informed. The second need is the interest which individuals have to be free from defamation and the ruinous effect which can result from an unrestrained and powerful media.

As applied to the facts of this case, the issue could be phrased as whether the public benefits more from having a press free to distort events and report events in an inaccurate and unfair manner than the public's need to judge their public officials free from unfair and inaccurate investigative reporting, as well as the public officials' right to protect his reputation and to be compensated for damage done to his reputation.

The effect of the actions of the Defendant/Appellee was such as to injure not only Mr. Wiley, the Plaintiff/Respondent, but to also injure the public by depriving them of the

ability to judge their political officers for past purposes, present purposes and future elections in a fair and accurate manner. The applicable Alabama code sections are 6-5-180, et seq. (1975).

I. Alabama law does not recognize any absolute privilege for communications made by the news media where the publication was made by a Defendant who either knew the publication was false or acted with reckless disregard as to the truth or falsity of the statement.

The examination of these issues requires a look into the state of mind of the Defendant and into the editorial processes of the defamed. "Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination". Hurbert v. Lando, 441 U.S. 153, 160, 99 S.Ct. 1635, (1979). "Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the Defendant and necessary to defeat the conditional privilege or enhance damages. The rules are applicable to the press and to other Defendants alike...." Id., 441 U.S. at 165, 60 L. Ed. 2d at 127.

The Supreme Court of Alabama, as recently as May 21, 1980, concerning facts similar to the facts presented in

the instant case, has held that (1) "broadcasting of defamatory matter by means of radio or television is libel whether or not it is read from a manuscript". Gray v. WALA-TV, 384 So. 2d 1062, 1065 (Ala. 1980). (2) That matter which imputes to the Plaintiff that they are engaged in conduct which is corrupt and illegal is slander actionable per se under the laws of the State of Alabama. Id. at 1065. (3) The words in order to determine their actionable character should be "construed and determined by their nature and probable effect upon the mind of the average television viewer. Bright v. Birmingham Post Co., 33 Ala. 547, 172 So. 2d 649 (1937)" Id. at 1065.

In determining whether summary judgment is appropriate in a defamation case, the Scintilla Rule is applicable in determining whether a material issue of fact exists. Alabama Rules of Civil Procedure, Rule 56, American Benefit Life Insurance Co. v. McIntyre, 375 So. 2d 239, 249 (1979) Further, the burden is on the movant in a summary judgment case involving libel grounded upon state law. Id. at 249.

"The only absolute privilege communications under Alabama Law are those made during legislative or judicial proceedings, or contained in legislative acts made under authority of law. Browning v. Birmingham News, 348 So. 2d 455, 458 (Ala. 1977)." Mead Corporation v. R. D. Hicks, 448 So. 2d

308 (Ala. 1983). The Supreme Court of Alabama promulgated a test for determining whether any other privilege exists in Fulton v. Advertiser Company, 388 So. 2d 533, 537 (Ala. 1980). Additionally, a test is required by the constitutional safeguards regarding First Amendment as enunciated in New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964) and as clarified in Gertz v. Welsh, 418 U.S. 323, 94 S.Ct. 2997 (1974).

The Constitutional standards require that to recover from a falsehood relating to official conduct, a public official is at least required to prove "that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times, supra; Gertz, supra.

Constitutional safeguards of the party pursuant to the standards set forth by New York Times v. Sullivan, supra require that the publication "must have been made with a knowledge of its falsity or with a reckless disregard as to whether it was false or not." Id. at 1066. The Court has embraced the elaborations set forth in the Supreme Court case of St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, (1968) which holds that "reckless disregard requires: sufficient evidence to permit the conclusion that the Defendant in fact

entertained serious doubt as to the truth of the publication. 88 S. Ct. at 1325". Gray, M supra, at 1066. In the present case, there was an ongoing investigation which failed to show any of the facts existed as set forth. The facts show a scintilla of evidence that the information was published with knowledge of its falsity or with reckless disregard of its truth or falsity.

The Fulton standard set forth for determining whether or not a privilege exists is as follows:

"Where a party makes a communication, and such a communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice... the duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social and moral in its nature and Defendant, in good faith, believes he is acting in pursuance thereof, although in fact he is mistaken." Fulton, supra at 537.

Presuming for the moment that the test for existence of privilege is as set forth in Fulton, supra, several requirements must be met for privilege.

(1) The statement must be made with actual malice. Actual malice is described under the Constitutional standards set forth above, and (2) the privilege must be made in good faith. (3) There must be an obligation prompted by duty.

Good faith would not be found where: (1) The statements made at the meeting were not the statements which were broadcast; or (2) The statements made at the meeting were not made by the parties to whom they were attributed. or (3) the statements made at the meeting were known to be false or were believed false due to investigation and the investigation was not made known to the public in the broadcast nor the scope of the investigation; or(4) The statements reported to have been made at the meeting were engineered or staged in part or in total by the Defendant. As each of these conditions are possible from the facts and the Scintilla Rule, summary judgment is inappropriate under the Fulton standards. Good faith is discussed in more detail under the discussion of Section 611 of the Restatement of Torts below.

The existence of a duty and an obligation to slander does not exist in any state.

In viewing the facts in a light most favorable to the Plaintiff, there is an issue as to whether the Defendant entertained serious doubts as to the

truth of the statements made. Summary Judgment is therefore inappropriate. "Whether the Defendant entertained serious doubts as to the truth of these broadcasts is a question peculiarly suited for a jury determination. American Benefit Life Insurance Co. v. McIntyre, 375. So. 2d 239 (Ala. 1979); Loveless v. Graddick, 295 Ala. 142, 325 So. 2d 137 (1975)." Gray v. WALA-TV, 384 So. 2d 1062, 1066. (Ala. 1980).

II. Application of Section 611 would not defeat Plaintiff's cause of action for libel.

The Petitioner/Appellant before the Alabama Supreme Court alleged that the only material issue for determination of this case is whether or not Section 611 of the Restatement (Second) of Torts applies and took certain other facts as presumed in its favor. This requires a more detailed analysis of the facts in this case and the issues presented by Section 611 of the Restatement (Second) of Torts be made.

Section 611 would propose to set forth the standards for determining good faith in the event that the duty was presumed 'to report what happens at a public meeting by a television broadcasting station.' Section 611 does not give the reporter a free hand to slander under the cloak of an existing public meeting. Instead, it puts a

fairly strong burden on the Defendant, the report of events that occur at a meeting must be accurate. "[I]t is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it...." Restatement (Second) of Torts, "Defamation: Defenses" Chapter 25 at 300 Sec. 611. "The reporter is not privileged under this section to make additions of his own that would convey a defamatory impression in order to impute corrupt motives to anyone, nor to indict expressly or by innuendo the veracity or integrity of any of the parties." (Id. at 300-301).

Upon a deviation from the events as they actually occured, the burden shifts to the Defendant to show that the deviation is not substantial and not unduly suggestive.

Patrick Miller who was present at the meeting saw the Defendant could not clearly understand what was being said by the people present so as to attribute the alleged statement to the meeting or group. (T-128)

"Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceedings." Restatement (second) of Torts, Sec. 611 Defamation: Defenses Chapter 25 at 298. If

knowledge of the falsity of a statement is not published or if information which would negate the truth of the statement is not published, then the statement cannot be fair nor accurate.

In the present case, ample evidence exists that the Defendants did, in fact, investigate the truth of this matter and that pursuant to the investigation, one of the employees of the Defendant, Barbara Shaw, made contact with one of the parties and two (2) attorneys, (T-576, 577), all of whom denied the statements (T-578) and offered various ways to substantiate their position that the statements made in the broadcast were false (T-350) in a conversation with Barbara Shaw on March 14, 1983 (T-578), (T-355-358).

There was absolutely nothing published concerning this investigation in the broadcast of March 25, 1983, made by the Defendant, nor did they give their failure to investigate or any of the other evidence concerning the origin of the rumors presented which would tend to show the lack of veracity of those rumors. None of those contacted prior to the libel substantiated the rumor that Dan Wiley was involved with A.J.B. Corp. (T-585) Mark King was made aware of these facts and the concern over the broadcast and potential lawsuit and chose to ignore these facts. (T-591)

There is a substantial question as to the truth of the matters asserted in the report and Mr. Crow has denied accusing anybody of anything (T-366) and according to the actual transcript of the broadcast, statements were made that things were said and charged by a group when there is no proof that any of these statements were made nor that they were proved by any group in the event that they were said (T-552-554). Further, nothing was made in the report of the fact that the Defendant had made an investigation and found absolutely no basis for libel contained in their report. In the present case, not only are the statements questioned and the manner in which they are supposed to have been ratified by the meeting or group in question, but the existence of these statements having been made at all other than in the broadcast by WKRG, the Defendant, is questioned.

Deposition of Mark King

Q. "Well, Mr. Fonger also reported that according to the group the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit; didn't Mr. Fonger report that?

A. "If it says here in the script that -- in the transcript that he did, I suppose he did, yes.

Q. "Now, who said that at the meeting?

A. "Mr. Crow used the word 'fix,' the fix is in.

Q. "I ask you who said 'the County Commission fixed plans for two landfills because Commission President Dan Wiley would profit.'

A. "I don't know if anyone said that verbatim or not. We take stories -- when we do a story, we take what was said and put it in a -- we don't -- everything that's in one of our stories isn't word for word, something that someone said at a meeting. It would be impossible.

Q. "Who at the meeting said 'public officials would profit from this deal'?

A. "Mr. Crow said things to that effect, if not that particular statement. I can't remember whether or not he made that particular statement or not.

"...He certainly made statements that were -- you know, that he, -- I believe I do remember, and of course it has been a long time ago, but I believe I remember him saying that somebody on the County Commission would profit.

Q. "No, but when he makes critical statements such as you have described, or potentially sensitive statements, you want to write those down, wouldn't you?

A. "As much of them as I could.

And, I can -- you know, a lot of times when I cover something like that, I can only write down a few words or a few portions of that statement."

Q. " Well, you didn't just report on the public meeting. You reported on what Mr. Wiley and Mr. Haas told you. They weren't at the meeting, were they?

A. "No, but I reported on their reaction on what was said about them at a public meeting.

Q. "You knew before this story that Mr. Payne had told your station that Dan Wiley didn't own any interest in his corporation; you knew that, didn't you?

A. "I knew that, yes."

The question becomes whether or not the constitutional protection is forfeited by the falsity of the statements and the defamation of the Defendant, New York Times, supra 11 L. Ed. 2d at 701.

An investigation had been conducted by Barbara Shaw and Mark King which included contacting the parties and speaking with their attorneys, (T-576-577), and an on-site investigation of the meeting and subsequent phone calls.

CONCLUSION

There is a great deal of evidence to the effect that the actual statements made by WKRG are substantially different in their scope and character from the statements made, if any, at the meeting; and that the person or persons making any statements, whether similar or not to the statements broadcast, were persons of a different character and number than those indicated on the broadcast as compared to those which actually existed. There is evidence to show that the Defendant staged the broadcast in whole or in part. There is evidence to show that WKRG-TV, Inc. had reason to entertain serious doubts as to the truth of the broadcast due to the source of the libel, the lack of internal consistency in the broadcast and due to the prior investigations of reporters and due to the internal regulations in force by the station at the time. These facts were not made known to the public during the broadcast. In view of the facts supporting these serious doubts, the Defendant's motion for summary judgment was properly denied.

CERTIFICATE OF SERVICE

I, Gregory M. Friedlander, attorney for Appellee in the above entitled case, hereby certify that I have served a copy of the foregoing Brief upon counsel for the Appellant by deposition a copy of same in the United States Mail, postage prepaid and addressed to:

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_____
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